IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1503

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,
Appellants,

vs.

THE WICHITA BOARD OF TRADE, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS.

REPLY TO MOTION TO AFFIRM

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INDEX.

TABLE OF CASES CITED. PAGE

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I.

Although appellees took the position before the district court that their motion for refunds should be decided by a single district judge rather than the entire three-judge panel, they now appear to concede (Motion to Affirm, p. 5) that all three judges of the court below properly ruled on the refund question and, thus, that jurisdiction of this appeal lies in this Court. The conflicting positions taken by the appellees mirror the appellants' own uncertainty as to whether this Court has jurisdiction at this stage (Jurisdictional Statement, pp. 9-10). If this Court

determines that the refund question is a one-judge issue, appellants are prepared to pursue their pending appeal in the Tenth Circuit Court of Appeals.

II.

The original judgment of the District Court in *Wichita Board of Trade* v. *United States*, 352 F. Supp. 365 (D. Kan. 1972) "suspended" or enjoined collection by the appellant railroads of grain inspection charges despite their approval by the Interstate Commerce Commission in a proceeding under § 15(7) of the Interstate Commerce Act, 49 U. S. C. § 15(7). This Court's order staying the District Court's judgment (409 U. S. 801) was conditioned upon the railroads' publishing an "accounting and refund" provision in their tariffs, under the terms of which the railroads were directed to refund any inspection charges collected pursuant to the stay "in the event the [District Court's] order suspending the charges is affirmed by this Court." Since this Court in fact *reversed* the District Court's judgment insofar as it suspended the inspection charges, *Atchison, T. & S. F. Ry. Co.* v. *Wichita Board of Trade*, 412 U. S. 800, 817-826 (1973), the District Court's later order directing that all inspection charges collected by the railroads pursuant to this Court's stay be refunded is patently inconsistent with the terms of the stay.

The appellees attempt to reconcile the clear inconsistency between the District Court's refund order and this Court's stay order by reference to footnote 1 in the plurality opinion in *Wichita*, 412 U. S. at 802. However, footnote 1 merely directed the District Court to enter an appropriate order, consistent with the *Wichita* opinion, regarding the disposition of inspection charges collected by the appellant railroads during the period covered by this Court's stay order. The District Court could have entered only two kinds of orders which would have been consistent with the *Wichita* opinion: an order denying refunds outright or an order referring the refund question to the Commission for an initial determination.* Instead, in directly ordering refunds, the District Court's action clearly was inconsistent with the regulatory scheme of the Interstate Commerce Act, which lodges sole discretion in the Commission to require refunds in or as a result of proceedings arising under § 15(7) thereof, and with this Court's interpretation of the regulatory scheme in *Wichita* (see Jurisdictional Statement, pp. 10-18). In effect, the District Court has repeated the same kind of mistake which seven Justices of this Court held it had made in its original judgment "suspending" the inspection charges.

III.

Appellees further contend that under the principles of the *Morgan* cases, *Morgan* v. *United States*, 304 U. S. 1 (1938) (*Morgan* I) and *United States* v. *Morgan*, 307 U. S. 183 (1939) (*Morgan* II), the District Court had authority sitting as a reviewing court of equity to require refunds of inspection charges collected as a result of this Court's stay order. However, the *Morgan* cases actually support judicial abstinence from ordering refunds in the context of this case.

In *Morgan*, certain stockyard companies sought judicial review of an order of the Secretary of Agriculture reducing certain stockyard rates pursuant to the Packers and Stockyards Act (7 U. S. C. §§ 181-229). The stockyard companies obtained a temporary injunction restraining enforcement of the Secretary's order; the injunction required deposit of the resulting higher rates with reviewing district court pending completion of the judicial review proceeding. In *Morgan* I, this Court set aside the Secretary's order on procedural grounds and remanded the

* The Commission in fact is presently considering the refund question with respect to *all* inspection charges collected by the railroads during the four-year period when the charges were in effect pursuant to the remand order of the Court of Appeals for the District of Columbia Circuit in *Secretary of Agriculture* v. *United States*, 551 F. 2d 1329 (D. C. Cir. March 11, 1977).

case. On remand, the Secretary reopened the proceeding to reconsider the reasonableness of the higher rates. While the proceeding before the Secretary was pending, the reviewing district court granted a motion by the stockyard companies to distribute the funds paid into the court among them. In *Morgan* II, this Court reversed the district court's refund order, holding that while a reviewing court of equity has authority to dispose of a fund paid into court pursuant to its own direction (307 U. S. at 191-197), the district court should have awaited the outcome of the proceedings pending before the Secretary so that it would have an appropriate basis for distributing the funds (pp. 197-198). The Court expressly held that where the agency was not without power to inquire whether injustice had been done by the earlier rate, the reviewing court must take into account the subsequent determination of the agency as the basis of its action in distributing the funds in its custody (307 U. S. at 196, 198).

Thus, although it involved an entirely different statutory scheme,* *Morgan* II requires the courts to refrain from passing on the refund question at this stage of this case. Here, the Commission in its decision on remand from this Court in *Wichita* held only that the inspection charges had not been shown to be just and reasonable and had to be canceled prospectively. The Commission not only declined to hold the inspection charges unreasonable during the period when the tariffs

* *Morgan* involved review of a decision of the Secretary of Agriculture in a proceeding under the Packers and Stockyards Act, which contained no provision comparable to § 15(7) of the Interstate Commerce Act lodging discretionary power in the agency to require refunds. In addition, in *Morgan* the agency's initial decision *disapproved* increased rates and was enjoined at the instance of those *collecting* the rates, while here the Commission's initial decision *approved* increased rates and was enjoined at the instance of those *paying* the rates. Finally, the difference between the higher and lower rates involved in *Morgan* was paid directly into the court, whereas here the railroads kept the difference subject only to the conditions of this Court's stay order.

containing the charges were lawfully in effect, but it also declined to rule on ancillary questions such as whether refunds should be required, expressly directing that consideration of such questions should be deferred to separate § 13(1) complaint proceedings.*

As if the foregoing were not enough to preclude the District Court's refund order under *Morgan* II, the Commission is *at this very time* reassessing the refund question in the basic § 15(7) proceeding involving the inspection charges pursuant to the remand order of the Court of Appeals for the District of Columbia in *Secretary of Agriculture* v. *United States*, 551 F. 2d 1329 (D. C. Cir. 1977).** If *Morgan* II has any applicability to this case at all, it surely precludes the District Court from passing on the refund question until the Commission has determined in pending proceedings whether refunds should be required in the circumstances of this case, thus providing the District Court with a sound basis for action.

For the foregoing reasons and the reasons set forth in our Jurisdictional Statement, it is respectfully submitted that the questions presented by this appeal are substantial and of public importance and that an order noting probable jurisdiction should be entered. However, if the Court concludes, without the necessity of further briefs or argument, that the refund question should have been decided by a single district judge, then this

* As noted in our Jurisdictional Statement (p. 6), a number of § 13(1) complaints have been filed with the Commission which seek reparation of inspection charges collected by the railroads, in part, during the very period covered by this Court's order.

** In *Secretary of Agriculture*, the court expressly recognized the Commission's discretionary powers under that section with respect to refunds, and directed the Commission to consider some of the very factors cited by appellees in their *post hoc* rationalization of the District Court's refund order—including the extent of the burden of proof which complaining shippers must bear in a § 13(1) proceeding for reparations. See 551 F. 2d at 1330, 1331.

appeal should be dismissed without prejudice to appellant's protective appeal to the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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